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No. 81-2386

In the Supreme Court of the United States

October Term, 1982

PHILIP DEL COSTELLO,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT ANCHOR MOTOR FREIGHT, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Did the lower courts properly apply the Maryland statute of limitations for actions to vacate arbitration awards to litigation instituted pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185?
2. Did the lower courts correctly allow retrospective application of *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), to the facts of this case in favor of both the employer and the union?

PARTIES IN THE COURT OF APPEALS

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit were Philip Del Costello (petitioner in this Court), Anchor Motor Freight, Inc.[1] (respondent in this Court) and Freight Drivers and Helpers, Local 557 (respondent in this Court). International Brotherhood of Teamsters was not a party in the court of appeals.

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[1]Anchor Motor Freight, Inc. is a subsidiary of Leaseway Transportation Corp.

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BRIEF FOR RESPONDENT ANCHOR MOTOR FREIGHT, INC.

Respondent Anchor Motor Freight, Inc. hereby submits its brief on the merits in the above matter.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland reported at 524 F.Supp. 721 (D. Md. 1981) is the decision concerning which the writ of certiorari was granted. This opinion substantially revised the earlier decision of the district court found at 510 F.Supp. 716 (D. Md. 1981). The opinion of the United States Court of Appeals for the Fourth Circuit affirming 524 F.Supp. 721 (D. Md. 1981) is unpublished but reported at 679 F.2d 879 (4th Cir. 1982).

STATUTES INVOLVED

Rules of Decision Act, as amended, 28 U.S.C. § 1652

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

National Labor Relations Act § 10(b), 29 U.S.C. § 160(b)

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing

or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Labor-Management Relations Act § 301(a), 29 U.S.C. § 185(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Md. Cts. & Jud. Proc. Code Ann. § 3-224

(a) *Petition.* – (1) Except as provided in paragraph (2), a petition to vacate the award shall be filed within 30 days after delivery of a copy of the award to the petitioner.

(2) If a petition alleges corruption, fraud, or other undue means it shall be filed within 30 days after the grounds become known or should have been known to the petitioner.

(b) *Grounds.* – The court shall vacate an award if:

(1) An award was procured by corruption, fraud, or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral, corruption in any arbitrator, or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of § 3-213, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement as described in § 3-206, the issue was not adversely determined in proceedings under § 3-208, and the party did not participate in the arbitration hearing without raising the objection.

(c) *When award not to be vacated.* – The court shall not vacate the award or refuse to confirm the award on the ground that a court of law or equity could not or would not grant the same relief.

Md. R. P. E2

After final award has been made in writing in an arbitration to which the Maryland Uniform Arbitration Act is inapplicable, court proceedings may be had to confirm, vacate, modify, correct, or enter judgment on the award. In any such case, the provisions of the Maryland Uniform Arbitration Act concerning such proceedings shall be applicable.

Md. R. P. E4

The procedure for application to a court otherwise than as provided in Rule E2 of this Subtitle for any relief in connection with an arbitration to which the Maryland Uniform Arbitration Act is inapplicable, shall be as nearly as practicable the same as that provided for such an application in arbitration to which said act applies. This Rule

affects only the procedure in such proceedings and does not establish a right to have any question determined by court.

COUNTERSTATEMENT OF THE CASE

On March 16, 1978, the petitioner brought an action pursuant to § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185,[2] in the United States District Court for the District of Maryland, seeking essentially the same relief that had been denied to him in a grievance arbitration proceeding. This action was filed more than seven months after the adverse arbitration award was issued, at a time when judicial determinations within Maryland and the Fourth Circuit provided no authoritative definition of the amount of time a party could defer filing a timely action. For over a decade federal courts in numerous other jurisdictions had been applying state statutes of limitations for actions to vacate arbitration awards to cases such as the petitioner's. However, the petitioner chose to ignore Maryland's limitations period for arbitration vacation actions and to delay the commencement of litigation.

After considering these facts in conjunction with the Supreme Court's decision in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), the district court granted summary judgment in favor of the respondents, holding that the petitioner's action was time-barred. The court concluded that Maryland's statute of limitations for actions to vacate arbitration awards was applicable to § 301 claims against employers and unions, in accordance with the view expressed by the majority of the Justices in *Mitchell*, and that it was appropriate to apply this state limitations

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[2]The petitioner's complaint before the district court also alleged jurisdiction under 29 U.S.C. §§ 301 and 411. (J.A. 3.)

period to a case filed prior to *Mitchell's* issuance. The court of appeals summarily affirmed the decision of the district court, based on the reasoning found in Judge Jones' October, 1981 opinion. By so doing, the lower courts kept intact the chain of cases starting before *Campbell v. Haverhill,* 155 U.S. 610 (1895) and continuing through *International Union, United Auto Wkrs. v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966), and *Mitchell,* which have affirmed the validity of the Rules of Decision Act, 28 U.S.C. § 1652, by applying state statutes of limitations to federal causes of action where no limitations period was expressly provided by Congress.

Factual Background

Respondent Anchor Motor Freight, Inc. (Anchor) is a corporation duly organized pursuant to the laws of the State of Delaware and licensed to do business in the State of Maryland. Anchor is engaged in the business of transporting new automobiles throughout this country and in Canada. (J.A. 7-8.) Petitioner Philip Del Costello was for a time employed by Anchor at its Baltimore, Maryland facility as a driver, hauling cars. (J.A. 5, 7.) Respondent Freight Drivers and Helpers, Local 557 (Local 557) is a labor organization affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. At all times relevant to this action, Del Costello was a member of Local 557, which served as his exclusive bargaining agent at Anchor.

The terms and conditions of Del Costello's employment with Anchor were detailed in the National Master Automobile Transporters Agreement and supplemental agreements (the Agreement). This document also established readily available procedures for the resolution of labor disputes. (J.A. 201.)

On June 27, 1977 Del Costello was assigned to drive a tractor-trailer loaded with new cars from the Baltimore terminal to Canada. (J.A. 13.) Even after some requested repairs were made and his superiors assured him that the equipment was safe, Del Costello refused to drive the rig claiming that it was still unsafe.[3] Anchor dispatched the vehicle without further repairs to another driver who examined the equipment, found no hazards and safely made the designated trip.

Del Costello's refusal to work was construed by Anchor as a voluntary quit. (J.A. 172.) In contrast, Del Costello viewed his severance from employment as a discharge and explained the events of June 27, 1977 to the Local 557 Business Agent, Arthur Morningstar, Jr., from that perspective when he spoke to the union representative

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[3]In his brief on the merits, the petitioner alleges that his conduct would now be protected by section 405(a) of the Truck Safety Act of 1982, a proposed statutory provision that has not yet been enacted into law. This frivolous assertion was never made before either the district or the circuit court. It is precisely this kind of irrelevant, immaterial and frankly scandalous matter that Rule 34.6 of the Rules of the Supreme Court of the United States is designed to prevent and strike. Moreover, the fallacy of the petitioner's premise is underscored by the fact that the same equipment with which he refused to work was inspected by another driver, found free of defects and taken on its intended route without additional repairs or mishaps. Even assuming that the petitioner had requested that he be given different equipment, the company was under no duty to provide him with another tractor-trailer or a different trip under these circumstances.

that evening.[4] When informal attempts by Local 557 to gain Del Costello's reinstatement proved fruitless, formal grievance proceedings were initiated by the union. (J.A. 18-19.)

In mid-July, 1977, a hearing was held on Del Costello's grievance before the Eastern Joint Conference Automobile Transporters Joint Committee (Joint Committee). (J.A. 19.) Del Costello appeared and testified at the hearing, along with Business Agent Morningstar, who also presented photographic evidence in support of the grievant's position. (J.A. 19, 76-77.) At the close of the hearing Del Costello was asked if he had been able to submit through his Business Agent all relevant evidence on his behalf. Del Costello responded: "I have nothing else to add." When then asked whether he felt that he had been properly represented he simply replied "[y]es." (J.A. 78.)

The Joint Committee denied Del Costello's grievance and held that the plaintiff's refusal to follow his superior's instructions constituted a voluntary quit. (J.A. 79.) Del Costello received a copy of the adverse award "several days" after it was rendered. *Delcostello v. International Broth. of Teamsters, etc.*, 524 F.Supp. 721, 722 (D. Md. 1981). Article 7, Section 6 of the Agreement provides in

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[4]The petitioner has repeatedly informed this Court of an unfair labor practice charge that he allegedly filed with the National Labor Relations Board (NLRB) against Anchor in connection with his severance from employment. (Petition at 7; Brief for Petitioner at 6.) However, it must be noted that neither the existence of an NLRB charge nor the NLRB's alleged deferral were ever mentioned in any of the proceedings before the lower courts. Nothing in the record below indicates that a charge was filed or that the NLRB deferred consideration of it. Additionally, there is nothing in the record below to suggest that either of these newly alleged events has any relevance to Del Costello's legal arguments. Consequently, the petitioner's comments concerning such a charge are not properly before this Court and should be stricken pursuant to Rule 34.6 of the Rules of the Supreme Court of the United States.

pertinent part that "[a] decision by a majority of a Panel of any of the Committees shall be final and binding on all parties, including the employee and/or employees affected."[5] (J.A. 211-12.)

On or about August 19, 1977, Local 557's Business Agent sent Del Costello a copy of the minutes of his grievance. (J.A. 69). The Business Agent informed him in an accompanying letter that these minutes were to be approved at a scheduled meeting of the Joint Committee. By sending him the minutes, the Business Agent gave Del Costello an opportunity to review and approve the minutes himself before the Joint Committee meeting in mid-September. The process to be followed then was much the same as when copies of corporate minutes containing a corporate resolution are distributed to members of a board of directors. This routine practice allows those who participated in the meeting at which the resolution was passed to ascertain that the minutes accurately reflect what took place. It does not empower the participants to add information that was not presented at the meeting or to alter the effect of the corporate resolution. Del Costello, like a participant in a board meeting, was given an opportunity to verify the accuracy of the Joint Committee's minutes. Mr. Morningstar's letter did not authorize Del Costello to present additional evidence, change his prior testimony or attempt to alter the decision of the Joint Committee. Nowhere in the Business Agent's letter was it stated that either Del Costello's response or the September Joint Committee meeting might be used as a forum for the re-

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[5]In his complaint the petitioner conceded that "the decision by a majority of the panel . . . was and is final, binding and conclusive upon the Union, the Company and the Plaintiff, with no right of further appeal except in cases of a deadlock." (J.A. 23, ¶ 22.) The panel considering Del Costello's grievance did not deadlock. (J.A. 79.) Therefore, according to Del Costello's understanding of the Agreement, the panel's decision was final and unappealable.

hashing of Del Costello's grievance or for the airing of his dissatisfaction with the handling and result of his grievance. Nowhere was it suggested that the decision underlying those minutes was less than final and binding.

Del Costello did not contest either the accuracy of the minutes or the finality of the Joint Committee decision in his response. Instead, in a letter dated September 14, 1977 (J.A. 80.), he set out the reasons for his dissatisfaction with the contractual grievance process. This was not a formal request for a rehearing of his grievance; nowhere in the letter was a rehearing requested. To the contrary, Del Costello asserted in his letter that even if the Joint Committee had heard all of the relevant evidence, it would have been incompetent to understand it. (J.A. 84.)

Proceedings Below

The petitioner had knowledge of all the facts on which he was to base his lawsuit by August 20, 1977, at the latest. *Id.* at 722. Nevertheless, he waited until March 16, 1978 to file an action in the Federal District Court for Maryland, alleging that his employment had been wrongfully terminated by Anchor and that Local 557 had breached its duty to represent him fairly in the ensuing grievance proceedings.[6] This action, which in effect seeks to vacate the July, 1977 Joint Committee award in order to obtain the relief demanded in the complaint, was filed over seven months after the final and binding grievance award was issued.

Anchor has consistently maintained that the petitioner's claims are time barred.[7] In response to Del Costello's

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[6]The International Brotherhood of Teamsters (International) was also named as a defendant in the petitioner's complaint. The allegations concerning the International are not material to the proceedings in this Court.

[7]The issue of waiver of the statute of limitations defense was neither raised by the petitioner nor considered by the court at any point in the district court proceedings.

original complaint, Anchor specifically asserted that the prosecution of the plaintiff's litigation was barred by the application of the appropriate statute of limitations. After discovery was completed,[8] the respondents filed separate motions for summary judgment.[9] In each motion, it was asserted that Del Costello's claims were barred by the statute of limitations. Specifically, Anchor and Local 557 maintained that the application of a thirty-day statute of limitations derived from Maryland's limitations period for the filing of actions to vacate arbitration awards, Md. Cts. & Jud. Proc. Code Ann. § 3-224, applied in conjunction with Rule E2 or E4 of the Maryland Rules of Procedure, precluded the district court from considering the merits of the plaintiff's claims.

At first, in reliance on the recent decision of the Court of Appeals for the Second Circuit in *Mitchell v. United Parcel Service, Inc.*, 624 F.2d 394 (2d Cir. 1980), the Maryland district court declined to grant the respondents' motions for summary judgment.[10] However, following the reversal of the Second Circuit decision by this Court and upon review of the respondents' joint motion for re-

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[8]During a status conference held before the district court during the early stages of this litigation it was agreed by the parties and established by the court that no motions for summary judgment would be filed until after discovery was completed. This was done in order to prevent piecemeal litigation of the issues.

[9]The International, which is no longer a party to this action, submitted a separate motion for summary judgment urging the dismissal of all claims against it on different grounds. This motion was granted.

[10]*Delcostello v. Intern. Broth. of Teamsters*, 510 F.Supp. 716 (D. Md. 1981).

consideration[11] the district court recognized the propriety of applying the principles explained by the Supreme Court in *Mitchell* to the case at hand and granted judgment in favor of the respondents.[12] Petitioner filed a timely notice of appeal from this second Order to the Court of Appeals for the Fourth Circuit.[13] The court considered the briefs

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[11]In his opposition to the joint motion, Del Costello consistently maintained that the state statute of limitations to be applied, if any, was the Maryland statute of limitations for actions to vacate arbitration awards. (J.A. 264.) Although he now urges the Court to apply a tort limitations period, if a state statute of limitations is applied in this case, this proposal was not proferred either in response to the respondents' joint motion or on appeal to the Fourth Circuit. Newly raised at this juncture, this argument is not properly before the Court and should be stricken. The petitioner cannot be allowed to continually add new allegations of facts and legal theories at each successively higher stage of judicial review. Just as it would have been improper for the court of appeals to decide the § 10(b) issue first raised by Del Costello in the Fourth Circuit, *see Delcostello v. International Broth. of Teamsters, etc.*, 679 F.2d 879 (4th Cir. 1982); (*see also* J.A. 220-281, 282-290), so too would it be inappropriate for this Court to consider any of the several facts and legal arguments that were not first presented to the district court.

[12]*Delcostello v. International Broth. of Teamsters, etc.*, 524 F.Supp. 721 (D. Md. 1981). Contrary to Del Costello's assertions, the district court did not "conclude" that Anchor and Local 557 were estopped from claiming that the statute of limitations began to run before December, 1977. The court stated that "[e]ven assuming that limitations did not begin to run until . . . late December, 1977" the action was not timely filed. *Id.* at 723, 725. The court did not decide the issue of estoppel because it deemed the resolution of that issue unnecessary.

[13]No appeal was taken concerning the granting of summary judgment in favor of the International. In addition, the petitioner's appeal did not question the dismissal of his claims filed pursuant to 29 U.S.C. §§ 301 and 411.

and oral arguments of petitioner and respondents. In an unpublished per curiam opinion, the appellate court affirmed the decision of the district court.[14] It is Anchor's position that, in the context of the facts set forth in this brief, the actions of the lower courts were just and correct.

SUMMARY OF ARGUMENT

The lower courts correctly applied Maryland's thirty-day limitations period for actions to vacate arbitration awards to Del Costello's action pursuant to § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 against Anchor Motor Freight, Inc. and Local 557, International Brotherhood of Teamsters. The Rules of Decision Act, 28 U.S.C. § 1652 commands the judiciary to look first at state statutes of limitations when the courts must borrow a limitations period to fill the void left by congressional silence. Only when the utilization of the local limitations period would frustrate federal policy or interfere with federal rights may the courts look to federal law or their own concepts of equity to fashion a new, national limitations provision. *Campbell v. Haverhill*, 155 U.S. 610 (1895).

Mitchell holds that in a § 301 case such as the one at bar, filed after an adverse arbitration award, courts must apply the limitations period for actions to vacate arbitration awards applicable under the law of the forum state. The application of this arbitration statute to Del Costello's claims does not frustrate national labor policy and does not interfere with the petitioner's rights under this or any other federal labor law. Moreover, there is no significant need for nationwide uniformity of statutes of limitations in § 301 cases. Consequently, the application of the state statute of limitations indicated by *Mitchell* is consonant with the guidelines of the Rules of Decisions Act as well as extensive judicial precedent. Under these circumstances,

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[14] 679 F.2d 879 (4th Cir. 1982).

judicial legislation of a uniform limitations period from § 10(b) of the National Labor Relations Act is inappropriate and unwarranted.

It is just and equitable for this Court to affirm the retroactive application of *Mitchell* to Del Costello's claims. *Mitchell* followed the decisions of several lower courts that had applied state statutes of limitations for actions to vacate arbitration awards to § 301 cases, when the substance of those proceedings involved disputes that had already been subjected to arbitration pursuant to a collective bargaining agreement. *Mitchell* did not reverse any decision of the United States Court of Appeals for the Fourth Circuit or the District Court for the District of Maryland that was in effect at the time Del Costello filed his action. To the contrary, *Mitchell* was clearly foreshadowed by the case law of that period. Accordingly, Del Costello failed to rely on existing law in his decision to defer filing his action.

Retroactive application of *Mitchell* will enhance industrial stability and promote the prompt resolution of labor disputes. It is contrary to national labor policy to allow an employee dissatisfied with the final and binding result of an arbitration award a prolonged period of time during which he may defer filing his action. At the same time, retroactive application will work no substantial injustice, even though this particular employee may lose access to an additional remedy.

The courts below considered these facts in accordance with the guidelines set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 91 (1971). They concluded that *Mitchell* should be retroactively applied and that Del Costello's claims against Anchor and Local 557 should be dismissed. It is respondent Anchor Motor Freight, Inc.'s position that the decisions of these courts are correct and must be affirmed.

ARGUMENT

I.

THE LOWER COURTS CORRECTLY APPLIED MARYLAND'S LIMITATIONS PERIOD FOR THE VACATION OF ARBITRATION AWARDS TO DEL COSTELLO'S § 301 CLAIMS

The application of Maryland's local statute of limitations for actions to vacate arbitration awards to a § 301 action filed by an employee against his employer and union is consistent with federal law and judicial precedents and best promotes the national policies underlying § 301 of the Labor-Management Relations Act. The application of a state statute of limitations to a federal cause of action when Congress has failed to specify a limitations period is a practice compelled by statute and followed for nearly a century. Contrary to the petitioner's suggestion, federal courts have been borrowing state limitations periods in federal actions for several years in situations substantially identical to the one present here. *E.g., International Union, U.A.W. v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).

The Court in *Hoosier* held that since Congress had not enacted a statute of limitations for § 301 actions, their timeliness "is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." *Id.* at 704-705. The Court concluded that it could not infer from Congress' silence on the subject that the federal legislature declined to act "in the expectation that the courts would invent [a limitations period]." *Id* at 703. *Hoosier* was consistent with the state of the law at the time of its decision as well as the Rules of Decision Act, 28 U.S.C. § 1652. Its holding is directly applicable to the case now before the Court. Nothing in the case at bar compels the reaching of a different result or the fabrication of a new statute of limitations. No developments in

the law during the years following *Hoosier* supports the reversal of that ruling or the application of a limitations period other than Maryland's arbitration statute.

A. The Rules of Decision Act Compels the Application of State Statutes of Limitations to Federal Actions When Congress Has Elected Not to Enact a National Limitations Period.

The decision of the United States Court of Appeals for the Fourth Circuit in this case, like that of the Supreme Court in *Hoosier*, was prescribed by the Rules of Decision Act, 28 U.S.C. § 1652. The controlling nature of this statute when Congress has not specified the limitations provision to be applied to a private right of action was established nearly a century ago, in *Campbell v. Haverhill*, 155 U.S. 610 (1895). There the court stated:

> That this section embraces the statutes of limitations of the several States has been decided by this Court in a large number of cases, which are collated in its opinion in *Bauserman v. Blunt*, 147 U.S. 647. To the same effect are the still later cases of *Metcalf v. Watertown*, 153 U.S. 671 and *Balkam v. Woodstock Iron Co.*, 154 U.S. 177. Indeed, to no class of state legislation has the above provision been more steadfastly and consistently applied than to statutes prescribing the time within which actions shall be brought within its jurisdiction.

155 U.S. at 614.

The Rules of Decision Act establishes the path that the courts must follow in selecting the limitations period that will best fill the interstices of federal law. First, the courts are duty-bound to examine the law of the forum state to determine whether there is in that state's laws a limitations period that could be applied to the kind of action pending before the federal bench. *Sine v. Local*

No. 992, Inter. Broth. of Teamsters, 644 F.2d 997, 1002 (4th Cir. 1981); *O'Hara v. Kovens,* 625 F.2d 15, 17-18 (4th Cir. 1980), *cert. denied,* 449 U.S. 1124 (1981); *Forrestal Village, Inc. v. Graham,* 551 F.2d 411 (D.C. Cir. 1977). For "Congress has created many federal rights without prescribing a period for enforcement. In such cases the . . . applicable period of limitations is that which the state itself would enforce had an action seeking similar relief been brought in a court in that state." *Beard v. Stevens,* 372 F.2d 685, 688 (5th Cir. 1967).

It is only when the adoption of the analogous state statute of limitations would clearly be inconsistent with the policies underlying the federal action that the federal courts may proceed to a second step: fashioning a new federal limitations period by borrowing another federal statute's limitations period or by applying federal principles of equity. *Hyland v. Dennison Mfg. Co.,* 496 F.Supp. 939 (D. Mass. 1980); *EEOC v. Sheet Metal Workers Intern. Ass'n Local No.* 122, 463 F.Supp. 388 (D. Md. 1978); *Korn v. Merrill,* 403 F.Supp. 377 (E.D. N.Y. 1975), *aff'd,* 538 F.2d 310 (1976).

Applying this principle, the federal courts have borrowed state limitations periods in a variety of contexts. In *O'Hara v. Kovens, supra,* a state limitations period was borrowed for implied private rights of action under § 10(b) of the Securities Act of 1934, 15 U.S.C. § 78. *See also Forrestal Village, Inc. v. Graham, supra; Saylor v. Lindsley,* 391 F.2d 965 (2d Cir. 1968). In *Gruca v. U.S. Steel Corp.,* 495 F.2d 1252 (3rd Cir. 1974), a local limitations law was applied in a case filed pursuant to the Military Selective Service Act. Similarly, state statutes of limitations have been applied to express and implied rights of action filed pursuant to the antitrust laws, *Chattanooga Foundry v. Atlanta,* 203 U.S. 390, 397 (1906); *Bertha Bldg. Corp. v. National Theatres Corp.,* 269 F.2d 785, 788 (2d Cir. 1959), *cert. denied,* 361 U.S. 960 (1960); the

various civil rights laws, *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975) (Civil Rights Act of 1866); *O'Sullivan v. Felix*, 233 U.S. 318, 322 (1914) (Civil Rights Act of 1871); *EEOC v. Sheet Metal Workers Intern. Ass'n Local No. 122, supra* (Title VII, 42 U.S.C. § 2000e); *Jones v. Jones*, 410 F.2d 365 (7th Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970); the National Bank Act, *Cope v. Anderson*, 331 U.S. 461, 463, 466 (1947); and the Patent Act, *Campbell v. City of Haverhill, supra.*

The federal courts have declined to borrow state statutes of limitations in only a very few narrowly defined situations, inapposite here. In *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958) the Court would not adopt a local limitations period in a federal action for unseaworthiness that had been joined with an action for Jones Act negligence. There, the state statute of limitations was shorter than the Jones Act limitations period. Because the plaintiff was compelled to institute both actions in one proceeding, the Court would not allow the shorter state statute to limit the plaintiff's federal right. However, the Court did not go on to establish a uniform limitations period applicable in all unseaworthiness cases. *Id.* at 224.[15] To the contrary, a plaintiff in a § 301 action

[15]The Court also declined to borrow a state limitations period in *Occidental Life Ins. Co. of Cal. v. E.E.O.C.*, 432 U.S. 355 (1977). That case involved the timeliness of an action filed by a federal administrative agency. There the Court determined that Congress intended that there should be no limitation on when the agency could bring suit, in order to provide the E.E.O.C. with an unhampered ability to resolve disputes through conciliation. The interests of the affected employer were deemed to have been sufficiently protected by the time limitation placed on the filing of an E.E.O.C. charge by an individual. The decision of that case can have no bearing on the instant one, involving a private action brought by an individual, other than to underscore the fact that the courts will apply a statute of limitations to an action filed by an individual and that the statute, where not provided by Congress, is generally borrowed from state law. 432 U.S. at 367.

is not compelled to initiate his claims under § 301 and his unfair labor practice charges before the NLRB simultaneously or in the same forum.[16] Accordingly, there is no conflict between the proposed state statute of limitations and federal rights, as there was in *McAllister*. *See Newport News Shipbuilding & Dry Dock Co. v. N.L.R.B.*, 631 F.2d 263 (4th Cir. 1980).

Applying the principles announced in these cases and the Rules of Decision Act to the case now before the Court, it is fundamental that the arbitral limitations period discussed in *United Parcel Service Inc. v. Mitchell*, 451 U.S. 56 (1981), and utilized by the courts below is the period that must be utilized in § 301 actions against employers and unions.

B. The Refusal of the Lower Courts to Adopt the Administrative Limitations Period from the National Labor Relations Act and to Create a National Limitations Period in Del Costello's § 301 Action Was Proper.

The Fourth Circuit properly rejected Del Costello's assertion that a six-month limitations period be borrowed from the National Labor Relations Act's requirements for the filing of a timely administrative charge and applied to his civil suit brought under § 301 of the Labor-Manage-

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[16]He is also not precluded from filing a § 301 action and unfair labor practice charges at the same time. The fact that inconsistent results might be reached does not affect the validity of each proceeding. Indeed, if Del Costello had initiated his § 301 action when he allegedly filed a charge with the NLRB, the timeliness of his action would not now be at issue.

ment Relations Act.[17] The lower courts correctly applied *United Parcel Service, Inc. v. Mitchell, supra,* to the case at bar and borrowed Maryland's thirty-day statute of limitations for the vacation of arbitration awards.

Mitchell establishes that the most analogous state statute of limitations that can be applied in a § 301 action against an employer and a union is the one for the vacation of arbitration awards. The Court in *Mitchell* observed that since the adverse arbitration decision in *Mitchell,* as here, was binding on all parties, the employee was compelled to show that his union had failed to fairly represent him during the arbitration before he could reach the merits of his breach of contract allegation. The necessity

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[17]Petitioner did not assert that § 10(b) ought to be borrowed in the proceedings before the district court. Although the petitioner casually alluded to the existence of § 10(b) as an alternative statute of limitations provision in his briefs in response to the respondents' motions for summary judgment, at no time did he urge the district court to adopt that six-month limitations period. To the contrary, the petitioner expressly relied on judicial precedent that proclaimed the inapplicability of § 10(b)'s limitations provision to § 301 actions and stated that "it would be presumptuous to expect this Court to promulgate a new national policy establishing six month limitations for all § 301 actions . . ."

The petitioner's failure to urge implementation of § 10(b) before the district court defeats any argument he may have been able to raise at that level. *American Casualty Co. v. Morris,* 51 F.Supp. 889 (N.D. W.Va. 1943), *aff'd,* 146 F.2d 208 (4th Cir. 1944). The desirability of finalizing judgments and terminating litigation leads to the binding of a party to the theories presented to the district court. *In re Linda Coal and Supply Company,* 255 F.2d 653 (3rd Cir. 1958); *Booth v. State Farm Mut. Automobile Ins. Co.,* 138 F.2d 844 (4th Cir. 1943). If the petitioner felt compelled to raise this issue, the district court was the appropriate initial forum. Having failed to urge the application of § 10(b) at that initial stage in this proceeding, he should not be allowed to do so now.

of a successful attack upon the union's conduct made the lawsuit "more analogous to an action to vacate an arbitration award than to a straight contract action." 451 U.S. at 62 (footnote omitted). Accordingly, the ninety-day limitations period found under New York law was applied. In this action, brought in the United States District Court for the District of Maryland, Md. Cts. & Jud. Proc. Code Ann. § 3-224, read in conjunction with Md. R. P. E2 or Md. R. P. E4 would require the application of a thirty-day limitations period to the case at bar. *See Board of Education of Charles County v. Educational Association of Charles County*, 286 Md. 358 (1979); *Brophy v. McLean Trucking Company*, No. M-81-2197 (D. Md. Dec. 2, 1982) (available on LEXIS, Genfed library, Dist file).

Although *Mitchell* was certainly intended to apply to Del Costello's claims against Anchor, a careful reading of *Mitchell* reveals that its holding was designed to apply to the union as well as the employer. The only defendant before the *Mitchell* Court was the employer. 451 U.S. at 71. However, it was apparent to Justice Stevens that the Court's ruling would be equally applicable to both employer and union. Consequently, he filed a separate opinion, dissenting from application of the defense to unions. 451 U.S. at 72. To deny the efficacy of the limitations defense to unions would give full effect to Justice Stevens' dissent, rather than to the majority's opinion. Therefore, it was proper for the court of appeals to affirm the lower court's decision to apply Maryland's thirty-day limitations period to bar the petitioner's action against both Anchor and Local 557. To allow a disgruntled employee to bring a § 301 action against his union after the limitations period for an action against his employer has expired would indirectly give the employee an extended opportunity he would not otherwise be allowed to collaterally attack the validity of an unfavorable arbitration award. This would

unjustifiably intrude on the finality of the bargained-for award, unnecessarily enlarge the time within which the "law of the shop" is uncertain and interfere with the basic goal of industrial stability underlying the collective bargaining process.

The decision of the Supreme Court in *Mitchell* to apply a state statute of limitations to § 301 actions, followed by the courts below, rationally furthers the public policy of encouraging the rapid resolution of labor disputes without seriously conflicting with any other federal labor statute[18] or policy. Therefore, the continued application of state statutes of limitations is consistent with the directives of the Rules of Decision Act.

The Supreme Court recognized that *Mitchell* would compel the application of limitations periods of varying lengths, depending on the situs of the action. 451 U.S. at 63, n. 5, 64. However, numerous federal courts have traditionally held that the adoption of a nationally uniform limitations period in a § 301 action would be unwarranted judicial legislation. *E.g., Hoosier; Sine v. Local No. 992, Inter. Broth. of Teamsters,* 644 F.2d 997 (4th Cir. 1981); *International U. of Operating Engineers, etc. v. Fischbach & Moore, Inc.,* 350 F.2d 936, 937-38 (9th Cir. 1965).

In *Hoosier,* the Court discounted the need for uniformity in § 301 actions stating:

> The need for uniformity . . . is greatest when its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote – the formation of the

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[18]Application of varying state statutes of limitations in § 301 actions in no way affects a party's right or obligation to seek relief from an unfair labor practice before the NLRB. An action brought pursuant to 29 U.S.C. § 185 and an unfair labor practice charge are separate and distinct proceedings, provided to achieve different federal goals. *See Newport News, supra.*

> collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy.

383 U.S. at 702. This rationale has served as the premise for the federal courts' consistent application of state statutes of limitations in § 301 actions against employers and unions following an adverse arbitration award. It is a rationale that has retained its viability over the years when applied in its original context or in the closely analogous situation presented by Del Costello's action.

The appellate court in *Service Employees International Union, Local No. 36, AFL-CIO v. Office Center Services, Inc.*, 670 F.2d 404 (3rd Cir. 1982) cogently explained the basis for the application of *Hoosier's* teachings as follows:

> [A]ctions brought to enforce an arbitral award are separate from the arbitration process itself and only come into play after the arbitration has terminated. Thus, whatever need may exist for national uniformity regarding the use of the arbitration process for the private settlement of labor disputes, the same considerations do not require similar uniformity when the judiciary is called upon to enforce an arbitral award.

670 F.2d at 409. There, as in the instant case, there was no overwhelming need for uniformity in the selection or application of a statute of limitations once the underlying arbitration award was being contested.

The Rules of Decision Act commands the judiciary to search state laws to fill the gaps in federal laws left by congressional silence before looking to federal laws and creating a new statute of limitations from that source.

Campbell v. Haverhill, supra at 614, 616; *Sine* at 1002. The local limitations provision suggested by *Mitchell* and applied in this case effectuates federal labor policies without affronting federal labor statutes or concerns. Although a uniform statute of limitations might provide greater predictability in the field of labor relations, such a result is neither necessary nor certain. Therefore, the Court is bound to avoid the kind of judicial legislation suggested by Del Costello.

The words of Justice Black on this point are instructive. In *Smith v. Evening News Ass'n*, 371 U.S. 195, 202-203 (1962) (J. Black dissenting) he stated: "[I]f such drastic changes are to be wrought in the [Labor Management Relations] Act that Congress passed, it seems important to me that this Court should wait for Congress to permit that operation. [Footnotes omitted.]" Over the years, this Court and others have heeded this lesson. *E.g., Hoosier; Occidental Life Ins. Co. of Cal. v. E.E.O.C.*, 432 U.S. at 367; *International U. of Operating Engineers, etc. v. Fischbach & Moore, Inc.*, 350 F.2d at 938. Anchor submits that this case does not provide an appropriate vehicle for altering that well followed course.

It is unnecessary for this Court to reverse the long line of precedent supporting the application of a state statute of limitations in § 301 cases similar to Del Costello's at this time, in this case. The usurpation of Congress' legislative function by the judicial creation of a federal statute of limitations is simply unwarranted where, as here, the federal statute to be borrowed applies exclusively to administrative proceedings and there is a viable alternative to be found in the state laws. Consequently, this Court should affirm the decision of the Court of Appeals for the Fourth Circuit to abstain from applying the limitations period of § 10(b) to an action filed under § 301 of the Labor-Management Relations Act.

II.

RETROSPECTIVE APPLICATION OF MITCHELL IN FAVOR OF ANCHOR AND LOCAL 557 IS JUST AND PROPER

The United States Court of Appeals for the Fourth Circuit was correct in affirming the district court's application of the statute of limitations set forth in *Mitchell* to Del Costello's claims. In line with the traditional rule of American jurisprudence, the court must apply judicial case law as it exists at the time of the decision. *Lawson v. Truck Drivers, Chauffeurs & Helpers, Local Union 100*, Nos. 81-3722, 81-3540 (6th Cir. Jan. 17, 1983) (Supplemental Appendix A-1); *Cash v. Califano*, 621 F.2d 626, 628 (4th Cir. 1980); *National Association of Broadcasters v. F.C.C.*, 554 F.2d 1118, 1130 (D.C. Cir. 1976).

In the most recent case on this subject, the Sixth Circuit retroactively applied *Mitchell* and utilized Ohio's ninety-day arbitration statute to bar an employee's claims against his employer and unions despite clear past precedent within the circuit applying a lengthier limitations period. The court reasoned:

> [W]e do not believe that *Mitchell* represents the kind of "clean break" with past precedent contemplated in *Chevron* and [*United States v. Johnson*, ____ U.S. ____, 102 S.Ct. 2579 (1982)]. *Mitchell* was simply a "clarification," an attempt to impose a single policy and a single rule in a legally chaotic situation. *Mitchell* was intended to resolve widespread confusion and conflict in the circuits concerning the applicable statute of limitations in these cases. We do not think that a "clean break" occurs every time the Supreme Court clarifies the law by resolving an issue on which there is circuit conflict and confusion. To so hold would reverse the regular common law rule, applied in *Chevron* and *Johnson*, that we should not normally have one law for old cases and another law for new cases.

Lawson v. Truck Drivers, Chauffeurs & Helpers, Local Union 100, slip op. at 6-7.

Decisions of the other circuits also support retroactive application of *Mitchell* to Del Costello's case. For example, in *McNutt v. Airco Industrial Gases Division*, 687 F.2d 539 (1st Cir. 1982), Massachusetts' thirty-day limitations period was applied to an action against an employer that had been pending when *Mitchell* was decided. Similarly, in *Service Employees Intern. U. Local No. 36 v. Office Center Services, Inc.*, 670 F.2d 404 (3rd Cir. 1982), the court held that the Pennsylvania arbitration act limitations period applied and refused to adopt the federal arbitration act's limitations period. In *Edwards v. Sea-Land Service, Inc.*, 678 F.2d 1276 (5th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 4051 (U.S. Jan. 11, 1983) (No. 81-525), *Mitchell* was applied retroactively and a Texas statute of limitations was adopted.[19] The Seventh Circuit has also applied *Mitchell* retroactively, *see, e.g., Stevens v. Gateway Transportation Company*, 112 L.R.R.M. (BNA) 2177 (7th Cir. 1982) (Illinois ninety-day arbitration statute applied to dismiss action against union as well as employer.), as has the Ninth Circuit, *San Diego County Dist. Council, United Broth. Carpenters & Joiners v. G. L. Cory*, 685 F.2d 1137 (9th Cir. 1982) (California 100-day statute of limitations ap-

[19]Because the Texas arbitration statute was found to be inapplicable to labor matters, a different state statute was chosen. This case must be compared with the same circuit's decision in *Rigby v. Roadway Express, Inc.*, 680 F.2d 342 (5th Cir. 1982), which applied *Mitchell* retroactively to compel application of Mississippi's arbitration statute to an employee's claims against both his employer and union, as well as the Sixth Circuit's holding in *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982), applying *Mitchell* retroactively but adopting the NLRA statute of limitations after Michigan's arbitration statute was found to be expressly inapplicable to labor disputes.

plied where there was no reasonable reliance on past precedent); *Washington v. Northland Marine Co., Inc.*, 681 F.2d 582 (9th Cir. 1982) (*Mitchell* applied retroactively, however the application of the arbitration vacation statute was neither urged by the parties nor adopted). Accordingly, the courts of appeals have uniformly upheld the retroactive application of *Mitchell* under the circumstances presented in the instant case.[20]

Retrospective application of judicial pronouncements has repeatedly been upheld throughout the annals of English and American jurisprudence. *E.g., Linkletter v. Walker*, 381 U.S. 618, 622-29 (1965). One view often expressed is that the law is a constant presence merely awaiting discovery and appropriate identification by judges. Nevertheless the courts have shown a concern for litigants who have actually relied upon the current status of the law in determining legal rights and responsibilities. This Court made an effort to balance and blend these concerns in *Chevron Oil Co. v. Huson*, 404 U.S. 91 (1971). The *Chevron* Court composed a three-part test to be utilized in deciding whether retroactive application of its decisions is warranted. These factors are:

1. Whether the newly announced decision establishes a new principle of law either by

   a. overruling clear past precedent upon which litigants have relied; or

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[20]*See also Flowers v. Local 2602 United Steelworkers of America*, 671 F.2d 87 (2d Cir. 1982) *cert. granted* No. 81-2408 (11/29/82); *Local 1020 v. FMC Corp.*, 658 F.2d 1285 (9th Cir. 1981); *Singer v. Flying Tiger Line Inc.*, 652 F.2d 1349 (9th Cir. 1981); *Christianson v. Pioneer Sand & Gravel Co.*, 681 F.2d 577 (9th Cir. 1982); *Hall v. Printing & Graphic Arts Union*, 112 L.R.R.M. (BNA) 2151 (7th Cir. 1982); *Davidson v. Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981); *Newton v. Local 801*, 684 F.2d 401 (6th Cir. 1982); *Sear v. Cadillac Automobile Co. of Boston*, 654 F.2d 4 (1st Cir. 1981).

b. deciding a question of first impression whose resolution was not foreshadowed;

2. Whether retrospective operation of the doctrine would enhance or hinder the policies of the newly announced rule; and

3. Whether substantial inequitable results would follow if the new ruling were applied retroactively.

All three of the factors listed in *Chevron* must be shown to favor only prospective application before a decision will be denied retroactive effect. *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278, 1289 (7th Cir. 1980). This requirement is in accord with the often repeated admonition that the denial of retroactive application of judicial decisions to pending cases is the exception, not the general rule. The application of these factors to the case at bar demonstrates that retroactive application of *Mitchell* is just and proper.

A. Mitchell Did Not Establish a New Principle of Law.

1. Mitchell Did Not Overrule Clear Past Precedent on Which Del Costello Could Have Relied.

The *Mitchell* case followed the decisions of several courts that applied state statutes of limitations for actions to vacate arbitration awards to cases brought pursuant to § 301, when the substance of those proceedings involved disputes between the same parties heard and resolved by an arbitration panel. In characterizing these § 301 actions as actions to vacate arbitration awards, the Court stated that its position was consonant with *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) and *International Union, U.A.W. v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).

The Court criticized the interpretation of *Hines* undertaken by the Second Circuit in *Mitchell*. The Court noted that *Hines* "strongly supports borrowing the limita-

tions period for actions to vacate arbitration awards." 451 U.S. at 61. This analysis is predicated on the need of the complaining employee to overcome an adverse arbitration award, through proof of union wrongdoing, before he is allowed to attack the merits of his breach of contract allegation. 451 U.S. at 62-63, n. 4. The *Hines* ruling was issued almost one year prior to Del Costello's termination. It offered him the same advice concerning the applicable statute of limitations as was apparent to the Court deciding *Mitchell*.

This the Court has consistently maintained that litigating parties rely upon their interpretations of lower court decisions at their own peril. A review of the status of fair representation litigation at the time Del Costello's alleged cause of action arose reveals that the law was not at all supportive of his position concerning limitations. The ruling of the Supreme Court in *Mitchell* overturned no federal precedent in effect at the time by which the petitioner should have initiated this action.

Decisions of the lower courts refute the contention that *Mitchell* overruled past precedents. In *Wallace v. American Telephone and Telegraph Co., Inc.*, 460 F.Supp. 755 (E.D. N.Y. 1978), decided scarcely one month after Del Costello instituted this litigation, the court stated:

> Judicial decisions to date line up solidly behind the view that, where there has been a previous arbitration award on the subject of a pending § 301 action, that action is governed by the short statute of limitations provided for actions seeking to vacate an arbitration award. *Barbarino* [*v. Anchor Motor Freight, Inc.*, 421 F.Supp. 1003 (W.D. N.Y. 1976)]; *DeLorto v. United Parcel Service, Inc.*, 401 F.Supp. 408 (D. Mass. 1975); *UMW v. Jones & Laughlin Steel Corp.*, 378 F.Supp. 1206 (W.D. Pa. 1974), *International Brotherhood of Teamsters, Local 249 v. Motor Freight Express, Inc.*, 356 F.Supp. 724 (W.D. Pa. 1973); *Lunceford v. Western Conference of Teamsters*, 74 Lab.Cas. (CCH) ¶ 10,160 (C.D. Cal. 1974); *Elrod*

> *v. Western Conference of Teamsters*, 66 Lab.Cas. (CCH) ¶ 11,941 (C.D. Cal. 1971), *aff'd*, 72 Lab.Cas. ¶ 14,197 (9th Cir. 1973); *Howerton v. J. Christenson Co.*, 65 Lab.Cas. (CCH) ¶ 11,569 (N.D. Cal. 1971). [Footnote omitted.]

460 F.Supp. at 758.[21] Indeed, all of the federal court authority cited by Del Costello in support of his hypothesis that *Mitchell* overruled clear precedent is either distinguishable or was decided subsequent to the events which are the basis of his claim. Therefore, Del Costello cannot demonstrate detrimental reliance.

Much of the authority to which the petitioner refers does not involve an attempt to vacate an arbitration award, as is present here, but instead relates to union refusals to arbitrate grievances.[22] Many of the other cases cited by Del Costello do not involve the raising of the same limitations defense argued here and in *Mitchell*.[23] Although at the time this case was filed some courts differed on their characterization of § 301 actions filed in the absence of a prior arbitration, they uniformly characterized actions like the petitioner's as ones to vacate

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[21]*See also Hill v. Aro Corp.*, 275 F.Supp. 482 (N.D. Ohio 1967).

[22]*Price v. Southern Pacific Transportation Co.*, 586 F.2d 750 (9th Cir. 1978); *Sanderson v. Ford Motor Co.*, 483 F.2d 102 (5th Cir. 1973); *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970); *DeArroyo v. Sindicato de Trabajadores Packing House*, 425 F.2d 281 (1st Cir. 1970); *Grant v. Mulvihill Brothers Motor Service, Inc.*, 428 F.Supp. 45 (N.D. Ill. 1976); *Mikelson v. Wisconsin Bridge and Iron Co.*, 359 F.Supp. 444 (W.D. Wisc. 1973).

[23]*Howard v. Aluminum Workers International Union*, 418 F. Supp. 1058 (E.D. Va. 1976), *aff'd*, 589 F.2d 771 (4th Cir. 1978) (The defendant union argued successfully that the plaintiff's claims were barred by application of Virginia's two-year tort statute of limitations. No argument was raised or considered concerning a statute for vacating arbitration awards. Moreover, no

arbitration awards for the purpose of assigning a limitations period when presented with that option.

Del Costello relies on only one decision from his circuit court of appeals, *Kennedy v. Wheeling-Pittsburgh Steel Corp.*, 81 L.R.R.M. (BNA) 2349 (4th Cir. 1972). However, that case did not involve an adverse arbitration award; it grew out of a union's refusal to prosecute a grievance concerning seniority rights. The plaintiff's claim was held to be time barred pursuant to West Virginia's five-year limitations period governing oral contracts. The court did not consider the union's contention that a shorter limitations period was applicable, because the union was able to prevail with the longer period.

Most of the remaining cases to which Del Costello refers were not issued until after Del Costello had filed his untimely complaint. For example, petitioner erroneously contends that *Smart v. Ellis Trucking Co., Inc.*, 580 F.2d 215 (6th Cir. 1978), had some impact on his decision to defer filing this action. The Sixth Circuit's decision was issued on July 25, 1978, over one year after the origin of Del Costello's claim and four months after the

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prior adverse arbitration award was present in the case.); *Hines v. Anchor Motor Freight, Inc., supra* (The choice of a limitations period was not an issue in the case.); *Singer v. Flying Tiger Freight Line Inc.*, 652 F.2d 1349 (9th Cir. 1981) (The limitations argument was raised for the first time on appeal. 652 F.2d at 1353. This factor was sufficient for the district court herein to distinguish *Singer*. 524 F.Supp. at 724.); *Warren v. International Broth. of Teamsters, etc.*, 544 F.2d 334 (8th Cir. 1976); *Butler v. Local U. 823, Int. Bro. of Teamsters, etc.*, 514 F.2d 442 (8th Cir. 1975); *Brooks v. Southwestern Transportation Co.*, 97 L.R.R.M. (BNA) 2616 (N.D. Tex. 1978); *Gallagher v. Chrysler Corp.*, 613 F.2d 167 (6th Cir. 1980) (Decided after this action was commenced.); *DeVries v. Interstate Motor Freight Systems*, 91 L.R.R.M. (BNA) 2764, 78 Lab.Cas. (CCH) ¶11,332 (N.D. Ohio 1976), *aff'd*, 620 F.2d 302 (6th Cir. 1980).

initiation of this action. The petitioner could not have used *Smart*, a decision rendered after he filed this case, as a basis for forbearance.[24]

The plaintiff in *Kennard v. United Parcel Service, Inc.*, 531 F.Supp. 1139 (E.D. Mich. 1982), was found to be entitled to rely on *Smart*. The *Kennard* court concluded that *Mitchell* should not be retroactively applied as a result of Kennard's actual reliance on *Smart*, which had been rendered by a federal appellate court in the circuit of which Michigan is a part. Kennard had not initiated his action in accordance with Michigan's twenty-day limitations period because the holding of *Smart* allowed a three-year delay in commencing an action. *Kennard* was distinguished only one month later by another judge of the same district court in *Kikos v. International Brotherhood of Teamsters*, 526 F.Supp. 110 (E.D. Mich. 1981). Like the instant case, the *Kikos* litigation was filed on March 7, 1978 before the Sixth Circuit's ruling in *Smart*, so that reliance on that appellate ruling was impossible. The *Kikos* employee had no right to forbear from initiating his action since:

> Prior to the date when Plaintiffs brought this cause of action . . . and through and until July 25, 1978 [the effective date of *Smart, supra*], the law was in a state of disarray with regard to the appropriate statute of limitations in cases such as the one now before this Court. Thus, during the period which preceded *Smart, supra*, Plaintiffs knew, or should have known the need to take appropriate, immediate action.

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[24]Similarly, Del Costello could not have opted to defer instituting this action in reliance on *Mitchell v. United Parcel Service, Inc.*, 624 F.2d 394 (2d Cir. 1980), *rev'd*, 451 U.S. 56 (1981), a case that was not even filed at the time the petitioner finally commenced this action.

526 F.Supp. at 115. Similarly, Del Costello could not have relied on a ruling that was not issued until after his complaint was filed.[25]

Del Costello has cited this Court to only one case decided before this action was filed, involving both a prior arbitration decision and a timely assertion that the applicable statute of limitations is the one found in state law for vacating arbitration awards: *Lehto v. Underground Construction Co.*, 69 Cal. App.3d 933 (1977). Del Costello's reliance on this lone case, assuming that he knew of its existence prior to the time this suit was brought, was unreasonable and unwarranted. In *Lehto*, the state court refused to apply California's one hundred-day limitations period for actions reviewing arbitration awards. Instead, the court utilized the state's four-year contract limitations statute. Issued a scant few months before Del Costello's alleged cause of action arose, it is, however, in direct conflict with two more authoritative rulings of California's federal district courts, *Elrod v. Western Conference of Teamsters, supra*, and *Howerton v. J. Christenson Co., supra*. Both 1971 federal cases compel a plaintiff in a § 301 action filed subsequent to an unsuccessful arbitration effort to bring that action within one hundred days.

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[25]The Sixth Circuit in *Lawson* has extended the *Kennard-Kikos* approach. The appellate court held in *Lawson* that a plaintiff in a § 301 action filed with the Sixth Circuit could not safely rely on *Smart* as the definitive statement of when to file a timely suit, in light of the fact that decisions of the different circuits on this subject were in obvious disarray. This reasoning is even more compelling in the instant case. Even if *Smart* had been in existence before Del Costello's complaint was filed, he would have had no right to rely on a ruling issued beyond the district and circuit of his residence in light of the multitude of conflicting opinions from other courts.

This Court has held that even in the presence of scattered authority contrary to its eventual ruling, retroactive application of the subsequent decision is appropriate. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776 (3rd Cir. 1967), *rev'd*, 392 U.S. 481 (1968), an action brought under § 2 of the Sherman Act, the Third Circuit Court of Appeals concluded that damages could commence only from the date of the Supreme Court's ruling in *American Tobacco Co. v. U.S.*, 328 U.S. 781 (1946) which, according to the circuit court, had changed the burden of proof in Sherman Act cases. Reversing the Third Circuit in *Hanover Shoe*, the Supreme Court gave retroactive effect to the rule it enunciated in *American Tobacco*. The Court pointed out that the *American Tobacco* opinion had not "indicated that the issue involved was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary to the view held by those courts." 392 U.S. at 496. Similarly, in *Mitchell* the Court did not indicate that it was adopting a radically new interpretation of existing authority. It follows then that retroactive application is as appropriate here as it was in *Hanover Shoe*.

It was neither the intent nor effect of the Supreme Court to overrule or radically change the status of the law with *Mitchell*. As early as 1967 federal courts had been applying similar limitations periods in order to conform with the national labor policies of encouraging the rapid resolution of labor disputes and ensuring the finality of grievance arbitration awards. *Hill v. Aro Corp.*, 275 F. Supp. 482 (N.D. Ohio 1967). At the time when Del Costello's claims could have been timely filed, no federal court decision existed to support the petitioner's contention that he relied on some now-invalid legal principle when he deferred the commencement of his action. Where as here, there is no reversal of a prior position, no novel issue, and

no clearly declared judicial doctrine within the circuit that was fundamentally altered by the new decision, Del Costello's contention of reliance is simply unjustified. His claim of reliance is purely a post-hoc rationalization that has no support in law or fact. It is a makeweight argument ignoring the state of the law at the time when he filed his action. Thus, consideration of the first prong of the *Chevron* standards compels retroactive application of *Mitchell*.

2. Del Costello Did Not Rely Upon Judicial Determinations In Deciding When To File His Action.

Del Costello had no legal basis for his determination in 1977 that he could forbear from instituting suit for eight months. However, even if the law had been different, Del Costello was required to demonstrate that he actually relied upon that law, rather than merely alleging that such reliance could have transpired. *Of Course, Inc. v. Commissioner of Internal Revenue*, 499 F.2d 754, 759-60 (4th Cir. 1974). *See also Porter v. Ashmore*, 421 F.2d 1186, 1189 (4th Cir. 1970).

At no point in the proceedings before the district court did the petitioner indicate that he relied to his detriment on any case. Indeed, Del Costello's own affidavit, submitted in connection with his argument on the statute of limitations, indicates that such reliance was absent. (J.A. 63-68.) The affidavit shows that he did not explain his plight to counsel until September, 1977. (J.A. 66.) Moreover, legal and factual research did not commence until the last week of December, 1977 and was not completed for more than an additional thirty days, in mid-February, 1978. (J.A. 68.) Thus, the statute of limitations expired before legal research was commenced, several months after Del Costello's termination was upheld at the arbitration hearing. Even if his tolling theory were meri-

torious,[26] the petitioner did not formally retain counsel until March 9, 1978 (J.A. 68), three months after he admits realization that legal action was appropriate. Actual detrimental reliance, a *sine qua non* of the *Chevron* test, is absent in the instant case. As a result, the lower courts' application of *Mitchell* to Del Costello's claims was appropriate and just.

3. The Supreme Court's Decision In *Mitchell* Was Foreshadowed By Prior Case Law And Was Not One Of First Impression.

A string of past precedents "paved the way" for the result reached in *Mitchell*. *Cash v. Califano*, 621 F.2d 626, 630 (4th Cir. 1980). The policies which those cases promoted were established by Congress and affirmed by the Supreme Court several years before this cause of action accrued. Indeed, the opinion of the Court in *Mitchell* was simply an authoritative restatement of the majority view on a relatively narrow issue of law.

Long before *Mitchell* reached the Supreme Court, it had been established that when a federal statute creates a right of action but specifies no statute of limitations, the state limitations period for analogous causes of action is to be applied. *Campbell v. Haverhill*, 155 U.S. 610, 614 (1895); *Walton v. United States*, 73 F.2d 15, 17 (8th Cir. 1934); *Bufalino v. Michigan Bell Tel. Co.*, 404 F.2d 1023, 1028 (6th Cir. 1968), *cert. denied*, 394 U.S. 987 (1968); *Jones v. Jones*, 410 F.2d 365, 366 (7th Cir. 1969),

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[26]The district court did not resolve the issue of tolling. 524 F.Supp. at 723, 725. However, the First Circuit recently took the opportunity to resolve this issue on similar facts in *McNutt v. Airco Industrial Gases Division*, 687 F.2d 539, 543 (1st Cir. 1982). The court rejected the contention that Massachusetts' thirty-day arbitration statute of limitations should be tolled when the employee had sufficient notice of possible wrongdoing to cause him to file a charge with the NLRB during that thirty-day period.

cert. denied, 396 U.S. 1013 (1969). It has also been long settled that under certain circumstances, a dissatisfied grievant could upset the finality of an arbitral decision and vacate or reverse the arbitral body's result. *Hines v. Anchor Motor Freight, Inc., supra.* Thus the conclusion that an action is best characterized as one to vacate an arbitration award when it seeks the same relief or argues the same claims as the grievance placed before the arbitration committee, was apparent since the decision in *Hines. Mitchell,* 451 U.S. at 61-62. This conclusion was neither novel nor surprising, as the Court's decision was in harmony with the decision of the Third Circuit Court of Appeals in *Liotta v. National Forge Co.,* 629 F.2d 903 (3rd Cir. 1980), which itself was based on a number of lower court opinions. The result in *Mitchell* was foreshadowed by the decision of a majority of the courts. Therefore, in accordance with the guidelines prescribed in *Chevron,* the Court should signify its approval of the application of *Mitchell's* principles to the case now before it.

B. Retroactive Application of the Law of *Mitchell* Will Promote the Operation of National Labor Relations Policies.

Statutes of limitation expedite judicial processes by forcing litigants to promptly state their claims at penalty of forfeiture. Their value is magnified when applied in the labor relations context.

A well established goal of federal labor law is the "relatively rapid disposition of labor disputes." *Hoosier,* 383 U.S. at 707. An integral feature of that policy is grievance arbitration. In order to obtain the goal of rapid dispute resolution within the framework of grievance arbitration, the arbitration process must be both fair and final. Even the alleged unfairness of a particular arbitra-

tion cannot be allowed to undermine the reliability of the arbitrator's decision indefinitely. *Mitchell* declared that it is more undesirable, as a matter of national policy and law, to keep the results of a grievance arbitration in limbo for long periods of time than it is important to provide aggrieved parties with an extended opportunity to secure a rehearing of their grievance in a neutral forum.[27]

Not to apply *Mitchell* retrospectively would defeat the federal labor policy underlying *Mitchell*. *See Cash v. Califano*, 621 F.2d at 631. (A recent judicial determination was retroactively applied to a pending case because, as here, the rule of the case and the policy behind it were one.) The Congressionally described need for predictability in labor relations requires the rejection of claims raised by those like the petitioner, who might appear years from now to complain about arbitrations that occurred before *Mitchell* was announced. Deferral to the generally shorter limitations period is the only way to keep the "law of the shop," a concept first announced by the Court in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), a reliable and workable doctrine. As a result, retroactive application of *Mitchell* in this case will promote the federal policies detailed by the Court in *Mitchell*.

C. Retroactive Application of *Mitchell* Will Not Produce Substantial Inequitable Results.

The fact that the retroactive application of the rule of law set forth in the *Mitchell* case will deprive the petitioner in this particular action of his opportunity to challenge the grievance committee's award does not bar retroactive application. Faced with similar situations, the

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[27]This declaration has been uniformly interpreted by the circuit courts as a mandate for retroactive application of *Mitchell*. *See* text *infra at* 25-27.

courts have often denied a litigant's request for non-retrospective application of new case law.

The Court "is well aware of how to avoid the effects of applying one of its rulings retroactively." *Holzsager v. Valley Hospital*, 646 F.2d 792, 797 (2d Cir. 1981), quoting *Cates v. Trans World Airlines, Inc.*, 561 F.2d 1064, 1073 (2d Cir. 1977). For example, in *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964) the Court specifically held that the rule of law announced therein would not be applied retroactively to either the case before the Court or to any other pending cases. In *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982), the Court applied the rule first set forth in that case to affirm the lower court's dismissal of the case at bar, but expressly held that the rule was not to be retroactively applied to other pending cases. Significantly, in *Mitchell* the Court said nothing that would suggest an intention to limit *Mitchell's* retroactive application. Consequently, contrary to petitioner's contention, *England* and *Northern Pipeline* are readily distinguishable and underscore the propriety of retroactive application of judicial law in this context.[28] Accordingly, this Court has already indicated that the equities lie in favor of retrospective application of *Mitchell*.

The development of a distinct rule on limitations for litigants dissatisfied with an arbitration award was foreseeable and consonant with the scattered decisions which have addressed the question. Because Anchor had a right to rely on the finality of the arbitration process or to expect that any dispute as to its finality would be raised within a very short time, the equities favor retroactive operation of *Mitchell*. Therefore, the Court should not hesitate to approve the decision of the Fourth Circuit

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[28]*See also Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

affirming the dismissal of Del Costello's claims against both Anchor and Local 557 on the basis of his failure to file his complaint before the expiration of the appropriate limitations period.

CONCLUSION

For the foregoing reasons, respondent Anchor Motor Freight, Inc. respectfully requests this Court to affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

No. 81-3722
81-3540

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD LAWSON (81-3722),
Plaintiff-Appellant,
v.
TRUCK DRIVERS, CHAUFFEURS & HELPERS, LOCAL UNION 100,
Defendant-Appellee.

GEORGE S. LEACH (81-3540),
Plaintiff-Appellant,
v.
UNITED STATES POSTAL SERVICE
and
NATIONAL ASSOCIATION OF LETTER CARRIERS
and
LOCAL 43, NATIONAL ASSOCIATION OF LETTER CARRIERS, et al.,
Defendant-Appellees.

BOTH CASES ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed January 17, 1983

Before: KEITH and MERRITT, Circuit Judges; PECK, Senior Circuit Judge.

MERRITT, Circuit Judge, delivered the opinion of the Court, in which PECK, Senior Circuit Judge joined. KEITH, Circuit Judge, (pp. 12-17) filed a separate opinion, concurring in part and dissenting in part.

Lawson v. *Local 100; Leach* v. *USPS* Nos. 81-3722, 81-3540

MERRITT, Circuit Judge. In these two *Vaca v. Sipes*, 386 U.S. 171 (1967) type actions for unfair representation against unions under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), the essential questions on appeal are: (1) whether *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981)[1] and *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982), require that a 90-day, Ohio limitations statute for actions to vacate arbitration awards be applied to malpractice-type actions against unions for unfair representation, as well as for actions for wrongful discharge against employers; and (2) whether *Mitchell* should be applied retroactively to cases pending when *Mitchell* was decided. We hold that *Mitchell* applies retroactively to pending cases and that under *Mitchell* and *Badon* the Ohio statute of limitations governing suits to vacate arbitration awards applies to unfair representation actions against unions as well as to wrongful discharge actions against employers.

I. FACTS

A. Appeal No. 81-3540

The record reflects that on August 22, 1978, appellant Leach entered the Cincinnati, Ohio Post Office while intoxicated and shouted obscenities about his supervisor and two postal security guards. On August 29, 1978, Leach was issued a Notice of Proposed Dismissal from the Postal Service for conduct unbecoming a postal employee, effec-

[1] *Mitchell* applies a 90-day state limitations statute governing actions to vacate arbitration awards as the federal limitations analogue for actions against employers for wrongful discharge. It does so on the policy ground that "one of the leading federal policies" in labor law is the need for "relatively rapid disposition of labor disputes." 451 U.S. at 63.

tive October 6, 1978. The August, 1978, incident was not Leach's first employment problem. His disciplinary record included several warnings and two lengthy suspensions for bad conduct.

Leach's last infraction before his discharge, based on conduct similar to that for which he was ultimately discharged, was the subject of a grievance settlement which reduced his suspension from twenty-eight days to fourteen days. An important element of that settlement was that Leach join and actively participate in the Postal Service's alcohol recovery program for alcoholics. Leach was notified in the settlement that he would be discharged should subsequent disciplinary action be necessary because of continued unsatisfactory job performance. When he thereafter caused a disturbance at work, while drunk, on August 27, 1978, he was discharged.

On September 21, 1978, the defendant postal unions filed a grievance on Leach's behalf asking that Leach be reinstated. The grievance was denied by the defendant Postal Service and was eventually certified for arbitration by the unions. On February 20, 1979, the grievance was heard by Arbitrator Alan Walt. On February 27, 1979, Arbitrator Walt issued his award denying Leach's grievance. In denying the grievance and thus upholding Leach's discharge, the arbitrator found significant Leach's "progressively worsening disciplinary history caused by alcoholism."

Leach's complaint against the employer and the union under § 301 was filed on October 6, 1980, more than 17 months after the Arbitrator's decision. District Judge Carl Rubin entered a final order dismissing the complaint against the postal service for wrongful discharge and against the unions for unfair representation under the 90-day Ohio limitations statute for actions to vacate arbitration awards, Ohio Rev. Code § 2791.13 (1976).

B. Appeal No. 81-3722

In October, 1976, plaintiff Lawson, employed in Ohio by the Mason & Dixon Lines, Inc, as a truck driver, was discharged. The defendant Local 100 was the employee collective bargaining representative for the truck line. The company based the discharge on alleged dishonesty in connection with the cashing of two pay checks for the same work week. Plaintiff had gotten a duplicate check by stating that the original pay check had been lost or stolen; subsequently, both checks were cashed. Plaintiff filed a grievance under the collective bargaining agreement and the grievance was eventually assigned for hearing before the Joint Conference or Committee on October 20, 1976. That Committee, composed of equal numbers of Union and employer representatives, upheld the discharge. A handwriting expert testified for the employer that the endorsements on both the checks were in the plaintiff's handwriting. Neither the Union nor the employee produced an expert witness.

After the discharge the plaintiff engaged private counsel who retained the services of a reputable handwriting expert. The expert concluded that both of the checks had not been endorsed by the plaintiff but on the contrary one bore a forged endorsement. When the Union was informed of this new evidence, an effort was made to reopen the arbitration. The arbitration was reopened and a hearing set for April 20, 1977. The plaintiff, dissatisfied with his prior union representation during the grievance and arbitration process, insisted that he be represented at that stage only by his private counsel. As a result of a meeting with his counsel and the employer, the plaintiff was reinstated with full back pay based on the expert testimony obtained by private counsel.

The plaintiff sued the Union for unfair representation on June 16, 1977, more than 6 months following completion of the arbitration process. He alleged that the union had not properly represented him at the October 20, 1976, arbitration hearing and had failed to get plaintiff promptly reinstated when advised of the opinion of the new handwriting expert. District Judge Hogan dismissed the case as untimely under Ohio's 90-day limitations statute for vacation of arbitration awards, § 2711.13, Ohio Rev. Code (1976).

II. SAME LIMITATIONS STATUTE APPLIES TO BOTH THE WRONGFUL DISCHARGE AND THE UNFAIR REPRESENTATION CLAIMS.

In both cases, the employee appeals the dismissal of the case against the union on limitation grounds, and in the postal case Leach appeals the dismissal of the employer as well. In both cases the alleged wrongful discharge was addressed in the collectively bargained grievance and arbitration process and a final decision was rendered. If *United Parcel Service v. Mitchell, supra,* is applied retroactively – a question we will address momentarily – it is clear that the action against the *employer* in the postal case was barred by Ohio's 90-day arbitration statute. That was the holding of *Mitchell.*

The narrow holding in *Mitchell* covers the wrongful discharge case against the employer but does not necessarily cover the unfair representation case against the union, as Justice Stevens points out in his concurring opinion in *Mitchell,* 451 U.S. at 71. Since *Mitchell,* however, this Court has clearly held in *Badon v. General Motors Corp., supra,* that "the *Mitchell* rule also applies to Badon's unfair representation claim" because the same

statute of limitations should be applied to both branches of the labor dispute, 679 F.2d at 98. Judge Martin's opinion for the Court in *Badon* relied on *Gallagher v. Chrysler Corp.*, 613 F.2d 167, 168 (6th Cir. 1980), which states the policy of this Circuit that the same statute of limitations should apply to both wrongful discharge and unfair representation cases. Although, as Justice Stevens points out in his concurring opinion in *Mitchell*, the two causes of action conceptually are based on somewhat different theories, *Badon* and *Gallagher* are the law of this Circuit until overruled or reversed, and they require application of the same limitations statute to both types of actions– the wrongful discharge claim against the employer and the unfair representation claim against the union.[2]

III. RETROACTIVE APPLICATION OF MITCHELL

The rule of *Mitchell* should be applied retroactively to pending actions against employers and unions. The normal rule is that in civil cases a recent authoritative opinion interpreting the law should be applied to pending cases unless it represents a "clean break" with the past and unless in addition it would be fundamentally unfair or otherwise burdensome to so apply it, see *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971); *United States v. Johnson*, 102 S.Ct. 2579, n. 12, 2595 (1982).

As *Mitchell* makes clear, the law on the limitations question in § 301 wrongful discharge and unfair representation cases has been in a state of confusion for some time. This Circuit and other circuits, prior to *Mitchell*,

[2]Even under Justice Stevens' rationale, it would appear that the 6 month statute for unfair labor practices found in § 10(b) of the Act, 29 U.S.C. § 160(b) would bar the actions against the unions in both cases because neither were filed within 6 months.

had adopted various state statutes of limitations, depending on the pecularities of the limitations law of the state in question and the arguments of counsel in the particular case. Although *Smart v. Ellis Trucking Co., Inc.*, 580 F.2d 215, 219 (6th Cir. 1978) ("action for wrongful discharge is not in the nature of a motion to vacate or modify an arbitration award") had rejected as not applicable the Michigan statute of limitations for setting aside arbitration awards, we do not believe that *Mitchell* represents the kind of "clean break" with past precedent contemplated in *Chevron* and *Johnson, supra. Michell* was simply a "clarification," an attempt to impose a single policy and a single rule in a legally chaotic situation. *Mitchell* was intended to resolve widespread confusion and conflict in the circuits concerning the applicable statute of limitations in these cases. We do not think that a "clean break" occurs every time the Supreme Court clarifies the law by resolving an issue on which there is circuit conflict and confusion. To so hold would reverse the regular common law rule, applied in *Chevron* and *Johnson*, that we should not normally have one law for old cases and another law for new cases. We note also that both this Circuit and others have assumed that the *Mitchell* rule applies retroactively; see *Badon, supra*, and *Davidson v. Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981). *But see Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349 (9th Cir. 1981) (*Mitchell* not retroactive). *Compare Singer with Local 1020 v. FMC Corp.*, 658 F.2d 1285, 1289-90 (9th Cir. 1981) (applying *Mitchell* retroactively).

IV. ADDITIONAL ISSUES IN LEACH CASE

In the postal case, *Leach v. United States Postal Service*, the plaintiff presents additional arguments that

the Ohio limitations statute on arbitration awards should not apply. We now consider those arguments.

A. The Effect of the Postal Reorganization Statute

Leach asserts that *Mitchell* is inapplicable because his claim against the United States Postal Service "is not of the 'hybrid type' claim pursuant to § 301(a), LMRA, but is predicated upon an independent jurisdictional statute, 39 U.S.C. § 409(b), which is in fact subject to an existing limitation period contained in 28 U.S.C." (Appellant's Brief at 16). The time limitation which *Leach* suggests should be applied pursuant to 39 U.S.C. § 409(b), a provision of the Postal Reorganization Act adopted in 1970, is the general six year statute of limitations set forth in 28 U.S.C. § 2401(a) governing civil actions brought against the United States. Leach bases this argument on the fact that his "claim is a contract claim asserted independently against" the federal government. (Appellant's Brief at 18).

This argument is incorrect. Section 2401(a) is not the applicable limitations statute. The grievance-arbitration process in the Postal Service came into the law in the Postal Reorganization Act of 1970. In passing the Act, Congress created "an independent establishment of the executive branch of the government of the United States," 39 U.S.C. § 201, whose labor relations are patterned after the private sector and to which the National Labor Relations Act applies, 39 U.S.C. § 1209. The national labor policy in favor of arbitration expressed in section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), is included in the Postal Reorganization Act. It authorized the collective bargaining parties to include "procedures culminating in binding third-party arbitra-

tion," 39 U.S.C. § 1206(b). To enforce the provisions of the collective bargaining agreement, Congress enacted 39 U.S.C. § 1208(b).

This Circuit and our sister circuits have uniformly held that 39 U.S.C. § 1208(b) is an analogue of Section 301(a) of the Labor Management Relations Act of 1957[3] and have consistently applied § 301 law to suits brought pursuant to 39 U.S.C. § 1208(b). *Malone v. United States Postal Service*, 526 F.2d 1099, 1103-1104 (6th Cir. 1975) (legislative intent of Postal Reorganization Act was to "bring postal labor relations within the same structure that exists for nationwide enterprise in the private sector"). *Accord, National Association of Letter Carriers, AFL-CIO v. United States Postal Service*, 590 F.2d 1171 (D.C. Cir. 1978); *Melendy v. United States Postal Service*, 589 F.2d 256 (7th Cir. 1978); *Winston v. United States Postal Service*, 585 F.2d 198 (7th Cir. 1978); *National Association of Letter Carriers v. Sombrotto*, 449 F.2d 915, 919 (2nd Cir. 1971).

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[3]Section 1208(b) of the Postal Reorganization Act of 1970, 39 U.S.C. § 1208(b), provides as follows:

> Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

Section 301 (a) of the Labor Management Relations Act of 1957 ("LMRA"), 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Thus, since the courts have applied § 301 case law to Postal Service labor relations cases arising under 39 U.S.C. § 1208(b) and since it is from the § 301 case law that *Mitchell, supra,* arose, *Mitchell* is clearly applicable to Leach's action against the Postal Service.

B. Leach's Assertion That His First Amendment Speech Allegations Remove His Case From The Application of UPS Is Without Merit.

Leach throws in the argument that since the alleged reason for his discharge from the Postal Service involved "an instance of speech" (mainly obscenities) and since speech is protected under the First Amendment of the United States Constitution, his case should be removed "from the restrictive application of the *Mitchell* principle" (Appellant's Brief 18-19). The Postal Service's answer to this argument is well-taken: "While he makes these contentions, Leach refuses to recognize, as he did in his arbitration proceeding, that it was his alcoholism which caused the misconduct which led to his discharge". (Appellee's Brief 17):

> "Moreover, even assuming *arguendo,* that Leach's speech was protected by the First Amendment, he cites no case to support a conclusion that the statute of limitations in challenging his discharge is therefore extended. Carried to its logical conclusion, Leach's argument is that anyone who is discharged will be afforded a longer period within which to file suit if he exercises his right of free speech and shouts an obscenity as he leaves his workplace. Such an argument not only lacks support in the law, it defies common sense." (Appellee's Brief 18.)

C. Amendment of Answer to Assert Limitations Defense

The District Court did not err when it permitted defendants to amend their answers to assert the *Mitchell*

statute of limitations defense. The scope of this Court's review of the District Court's decision to permit the Postal Service to amend its Answer is narrow. Review is limited to the question of whether the District Court abused its discretion in allowing the amendment. *Hayden v. Ford Motor Company*, 497 F.2d 1292 (6th Cir. 1974).

Rule 15(a) of the Federal Rules of Civil Procedure permits the amendment of pleadings. The Rule provides, in pertinent part, that:

> [A] party may amend his pleadings only by leave of court or by written consent of an adverse party; and *leave shall be freely given when justice so requires.* (emphasis added).

This Court, as well as others, has freely allowed the amendment of pleadings in the absence of substantial prejudice to the opposing party. *Estes v. Kentucky Utilities Co.*, 636 F.2d 1131 (6th Cir. 1980); *Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479 (6th Cir. 1973); *Head v. Timken Roller Bearing*, 486 F.2d 870 (6th Cir. 1973). Our review of the record indicates that defendants asserted the *Mitchell* statute of limitations defense shortly after *Mitchell* was decided. We do not find present here the kind of prejudice that prevents amendment, and therefore we do not find that the District Court erred in permitting the amendment raising the limitations defense.

V. EQUITABLE TOLLING

Finally, the plaintiffs in both cases argue that general equitable considerations should appeal to the conscience of the Chancellor and should toll the running of the *Mitchell* statute of limitations. Their arguments here are similar to their retroactivity arguments. They basically

assert that the *Mitchell* rule, even if applicable, comes as a surprise and that it is unjust to refuse to hear their claims. We have reviewed each record carefully seeking to find equitable considerations that would justify an exception to the Supreme Court policy of rapid settlement of labor disputes or would otherwise justify tolling. We do not find any such considerations present. Lawson's claim for damages is that the union failed to find, employ and present at the arbitration hearing a handwriting expert. Leach's basic claim is that the union failed to persuade his employer to give him another chance. Neither of these claims presents facts indicating bad faith or wrongdoing on the union's part or any other circumstances that compel the conscience of the Chancellor to extend, set aside or make an exception to the law.

Accordingly, the judgments of the District Courts in Appeal Nos. 81-3722 and 81-3540 are affirmed.

KEITH, concurring in part and dissenting in part. I respectfully dissent from the Court's holding in No. 81-3722, *Lawson v. Local 100*. In its haste to dismiss Lawson's cause of action, the majority chooses to ignore some of the most important facts of this case. These facts are the crux of Lawson's cause of action. When viewed in the context of the relationship between a union and those it represents, they compel a different result.

First, the majority opinion notes in passing that "[n]either the Union nor the employee produced an expert witness" at the hearing before the Joint Conference or Committee on October 20, 1976. *Ante* at —. What the majority fails to state is that the Union promised to produce a handwriting expert at the hearing. The district court expressly held in its July 21, 1980 Memorandum on the Defendant's Motion for Summary Judgment,

> On a summary judgment motion it must be assumed that the Union agreed to obtain some expert examination, did not, and did not request a continuance of the hearing for that purpose.

Lawson's claim is that the Union made affirmative representations upon which he relied. Then the Union handled his claim in a perfunctory manner. *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). The majority's opinion completely ignores the underlying implication to be derived from these facts. That is, if the Union had not made the representation, Lawson himself would have been on notice that he might have to supply his own handwriting expert.

Second, the majority opinion states, "When the Union was informed of this new evidence, an effort was made to reopen the arbitration." *Ante* at —. This statement is not supported by the record. In fact, the record contains evidence which supports Lawson's conclusion that the Union ignored him.

The affidavit of Paul H. Tobias, Lawson's private attorney, states that he made repeated attempts to obtain the Union's help in vindicating Lawson. He wrote Mason & Dixon Lines, Inc. (the Company) several times and sent copies of the correspondence to the Union. There was no response. He wrote the Union's attorney and attached copies of an expert's report which purported to show that Lawson was innocent. Still, there was no response. He communicated with President Kiser of the Union Local several times only to be told to talk to the Union's attorney. The record suggests that only after it became clear the Company was willing to reopen the hearing did the Union take any action. The Union was alerted to Lawson's need for help at least as early as December 2, 1976. It offered no help until April 1977.

The majority implies that Lawson's settlement was the reason why there was no new rehearing. He employed private counsel, the majority maintains, because he was "dissatisfied with his prior union representation during the grievance process." *Ante* at —. One can hardly blame Lawson for insisting upon private counsel if the allegations of his complaint are true. He certainly should not be punished for refusing to trust his fate to the Union once more. Moreover, the Union had more than four months to fulfill its statutory duty. The Union told Lawson there was nothing else it or he could do under the collective bargaining agreement.

Third, the court's characterization of this as an action to vacate an arbitration award is incorrect. There is absolutely nothing in the record which indicates that Lawson wants to vacate the original arbitration award. He has no need to do so. The two parties in the arbitration proceeding were the Company and the Union. The latter purported to represent Lawson's interests. The Committee

made an award to the Company. Subsequently, Lawson was vindicated. The Company agreed to reinstate Lawson with backpay and all other benefits. This was done without vacating any arbitration award, and the record suggests that it was done despite less than diligent efforts by the Union. The majority opinion fails to explain how the present action against the Union for breach of the duty of fair representation can be characterized as an action to vacate an arbitration award.

Lawson is requesting only that he be made whole for the Union's breach of its statutory duty. The facts in this case are different from the facts in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1980). In *Mitchell*, Justice Rehnquist explained:

> Respondent suggests *Hines* actions might also be characterized as actions upon a statute, personal injury actions, or malpractice actions, all governed by a 3-year limitations period in New York, N.Y.Civ.Prac. Law §§ 214(2), 214(5), 214(6). All of these characterizations suffer from the same flaw as the effort to characterize the action as one for breach of contract; they overlook the fact that an arbitration award stands between the employee and any relief which may be awarded against the company.

Id. at 1564 n.4.

There simply is no support for the proposition that a pure claim that a union breached its statutory duty should be treated as if it were a hybrid claim against the Union and the Company. This holding is especially untenable in those cases where no arbitration award stands between the grievant and legal relief. The cases cited by the majority were all hybrid actions in which litigation against both

the Union and the Company was necessary to afford the grievant the relief requested.[1] In such cases, there might be some justification for applying the same statute of limitations against both defendants. There is no rationale, however, for applying this rule to claims like this one.

The majority relies on dicta in Judge Phillips' opinion for the Court in *Gallagher v. Chrysler Corp.*, 613 F.2d 167 (6th Cir.), *cert. denied*, 449 U.S. 831 (1980). In *Gallagher*, Judge Phillips stated, "We hold that, *in an action against an employer and a Union under LMRA*, the same statute of limitations ordinarily should apply as to both defendants." *Id.* at 169 (emphasis added). *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982), upon which the Court also purports to rely, was another claim against both an employer and a Union. In his opinion for the Court, Judge Martin reiterated the need for prompt resolution of labor disputes. The only case cited by Judge Martin for applying the same statute of limitations to both claims was *Gallagher*. *See Badon*, 679 at 98. As noted above, *Gallagher* expressly limits its holding to suits against both an employer and union.[2]

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[1] In *Gallagher v. Chrysler Corp.*, 613 F.2d 167 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980), the appellant charged that Chrysler had discharged him without good cause and that his union, by withdrawing his grievance before arbitration, had failed to represent him in good faith. Similarly, appellant Badon in *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982) claimed that General Motors wrongfully denied him pension benefits and that the United Auto Workers had failed to fairly represent him in the processing of his grievances.

[2] In *Badon*, Judge Martin noted: "It would be contrary to sound judicial policy to encourage actions to recover only the costs of litigation where no underlying right can any longer be vindicated in the action." 679 F.2d at 98. Until today, this language seemed to

The majority's reliance on the national policy favoring prompt settlement of labor disputes is meaningless in this case. The underlying dispute has been settled without judicial intervention. Neither labor peace nor a dispute between an employer and employee is at issue. That is why it is anomalous to treat this suit as an action to vacate an arbitration award.

Furthermore, the Court's statement of "national policy" completely ignores competing national labor policies. As the Ninth Circuit has noted in its interpretation of *Mitchell*, ". . . uniformity of limitations periods, though desirable, is not the dominant consideration in selecting the appropriate statute of limitations. Rather, characterization of the claim is the touchstone." *Christianson v. Pioneer Sand & Gravel Co.*, 681 F.2d 577 n.1 (9th Cir. 1982).

The majority's attempt to treat this case as just another claim agains a union and employer is unfortunate. As other circuits have discerned, the Supreme Court's characterization of the *Mitchell* case does not require that all cases brought under § 301 of the LMRA be treated as an action to vacate in arbitration award. *See e.g., Hand v. International Chemical Workers Union*, 681 F.2d 1308, 1313 (11th Cir. 1982); *Christianson*, 681 F.2d at 579; *Flowers v. Local 2602 of United Steelworkers*, 671 F.2d

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be strong support for a well-reasoned proposition. That is, where the statute of limitations has run on an employer and the claim was brought against both the employer and the union, it would be absurd to allow the claim to proceed against the union since all the plaintiff can recover are his or her litigation fees. There is no reason to allow the plaintiff to generate needless litigation expenses. However, that is not the claim before us now. There is an underlying right which can be vindicated, Lawson's attorney fees which were made necessary by the alleged perfunctory representation by the Union.

81, 91 (2d Cir.)[3]; *cert. granted,* 51 U.S.L.W. 3404 (November 30, 1982); *Sear* v. *Cadillac Auto Co. of Boston,* 654 F.2d 4, 5 (1st Cir. 1981).

Because I believe this is a tort-like action for breach of a fiduciary duty, I would apply the most analogous state statute of limitations.[4] *See International Union, UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966); *Smart v. Ellis Trucking Co.,* 580 F.2d 215 (6th Cir. 1978), *cert. denied,* 440 U.S. 958 (1979). In *Newton v. Local 801 Frigidaire Local of the International Union of Electrical Workers,* 684 F.2d 401 (6th Cir. 1982), our Court concluded that suits in Ohio based on breach of the duty of fair representation should be governed by the six-year statute of limitations for liabilities created by statute. Ohio

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[3]In *Flowers v. Local 2602 of United Steelworkers,* 671 F.2d 87 (2d Cir. 1982), the Second Circuit refused to treat a duty of unfair representation claim against a union as an action to vacate an arbitration award. Rather the Court noted that "an action for breach of the union's duty fairly to represent its members at arbitration proceedings is closely analogous to an action for attorney malpractice." *Id.* at 91. The Supreme Court, in granting the writ of certiorari, also agreed to address the question of whether the statute of limitations against the employer in hybrid actions automatically applies to a duty of fair representation claim against the union. 51 U.S.L.W. 3404 (November 30, 1982).

The Supreme Court granted review in another case which presents similar issues. *DelCostello v. International Brotherhood of Teamsters,* 679 F.2d 879 (4th Cir.) (unpublished opinion), *cert. granted,* 51 U.S.L.W. 3403 (November 30, 1982). In *DelCostello,* the Fourth Circuit applied the same statute of limitations to both the claims of the employer and the Union. It applied a thirty-day limitations period rather than the six-month period of § 10(b) of the National Labor Relations Act.

[4]In *Newton v. Local 801 Frigidaire Local of the International Union of Electrical Workers,* 684 F.2d 401 (6th Cir. 1982), Judge Phillips, writing for a panel of himself and Judges Merritt and Jones, expressly considered and refused to apply the six-month statute of

Rev. Code Ann. § 2305.07 (Page 1981).[5] If the six-year statute of limitations is applied, Lawson's claim against the union is timely and he is entitled to a trial on the merits.

The majority's opinion in this case illuminates the wisdom of Justice Black's concern for the "interests of the injured employee, the only one who has anything to lose" during arbitration proceedings. *Vaca v. Sipes,* 386 U.S. at 209 (Black, J., dissenting). Because the majority's opinion unfairly penalizes the injured employee in this case, I respectfully dissent.

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limitations provisions applied in *Badon.* It is, therefore, surprising that the majority would suggest that the alternative to the three-month limitations period is the six-month period of § 10(b) of the NLRA.

This case is more analogous to *Newton* than *Badon. Newton* and the instant case were both breach of duty of fair representation cases against a union. *Badon* was a case against both an employer and the union. The court applied section 10(b) in *Badon* because Michigan appeared to have no appropriate state statute of limitations for actions to vacate an arbitration award.

Judge Krupansky's opinion for the Court in *Pitts v. Frito-Lay,* Slip Op. at ____ n.3 supports this view. He correctly notes that *Badon's* holding is that "in Michigan the courts must apply a *federal* statute of limitations to § 301 actions" (emphasis in original). But Ohio has a limitations period for actions to vacate an arbitration award thus making the six-month statute of limitations of § 10(b) wholly inapplicable to either Lawson's or Leach's claim.

[5]Ohio Rev. Code Ann. § 2307 (Page 1981) provides: "Except as provided in section 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

Another solution in light of the Supreme Court's holding in *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56 (1981) and Justice Steven's dissenting opinion in that case would be to apply Ohio's shorter malpractice statute of limitations (one year). Ohio Rev. Code Ann. § 2305.11 (Page 1981). In either case, Lawson's action would be timely.